

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

September 21, 1995

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals pursuant to § 808.10 and RULE 809.62, STATS.

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 94-0588

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT IV

NORMA NELSON,

Plaintiff-Appellant,

v.

WISCONSIN EDUCATION ASSOCIATION
INSURANCE TRUST,

Defendant-Respondent.

APPEAL from an order of the circuit court for Dane County:
MICHAEL B. TORPHY, JR., Judge. *Affirmed.*

Before Gartzke, P.J., Dykman and Vergeront, JJ.

VERGERONT, J. Norma Nelson appeals from an order granting summary judgment to the Wisconsin Education Association Insurance Trust (WEAIT) on her claim that WEAIT improperly terminated her disability benefits after two years of monthly payments under a group long term disability benefit plan. She contends: (1) the trial court failed to apply the appropriate standard of review of WEAIT's termination decision; (2) WEAIT

conducted a selective review of the medical evidence in determining her eligibility for disability benefits under the plan; and (3) WEAIT's interpretation of certain plan language was arbitrary and capricious. We reject these contentions and affirm.

BACKGROUND

Norma Nelson was employed as a music teacher by the Loyal Public School District in Loyal, Wisconsin. As an employee of the district, she was covered by a group long term disability benefit plan issued by WEAIT to the school district. The plan provides that if a beneficiary under the plan becomes totally disabled, WEAIT will pay monthly disability benefits in accordance with a schedule of benefits.

WEAIT is a trust organized and existing under the laws of the State of Wisconsin and within the meaning of the Employee Retirement Income Security Act of 1974, 29 U.S.C. §§ 1001-1461 (ERISA). WEAIT was established for the purpose of providing various benefits to its members and employees and their families and dependents. It is administered by a board of trustees comprised of public school teachers.

All claims for benefits filed with WEAIT under the group long term disability benefit plan are subject to review by the claims department. The applicant must provide the claims department with proof of loss of income due to a total disability within ninety days of the start of the disability. The applicant must be under the care of a physician and the claimed disability must be verified by a physician. The claims department can refer questions or problems to a claims supervisor or health care consultant. WEAIT's health care consultants are registered nurses. The registered nurses review claims referred to them, make recommendations, and have the authority to obtain independent medical opinions from consulting physicians when they deem it necessary.

If a claim for benefits is denied, the claims department provides the beneficiary with an explanation. The beneficiary is afforded the opportunity to present additional information and support for his or her claim, which is then reviewed by the claims department. A final adverse decision by the claims

department is appealable under the trust agreement to an appeals committee of the board of trustees. The claimant is given an opportunity to submit additional evidence in support of his or her claim and appear in support of his or her appeal petition.

Upon receipt of an appeal petition, a designated administrator of WEAIT is assigned the responsibility for reviewing the claim file and preparing an appeal record for review by the appeals committee.

The group long term disability benefit plan under which Nelson was eligible for coverage contained the following provision:

After an aggregate of two years of monthly disability benefit payments hereunder for total disability due to neurosis, psychoneurosis, psychopathy, psychosis, or mental or emotional disease or disorder of any kind, the Trust will pay the monthly disability benefit only for the period during which a Covered Employee is confined in a hospital or other institution qualified to provide care and treatment incident to such disability.

Nelson became seriously ill in 1985 and permanently left her employment on September 5, 1985. Nelson applied for long term disability benefits on April 2, 1986. Her original application listed "paranoid personality disorder" and "chronic depression" as the diagnosis. Nelson's attending physician, Dr. P. Hansotia, provided a statement that Nelson was totally disabled and suffered from a psychogenic headache. The claims department initially denied her claim on the grounds that her application was untimely and that she had failed to provide medical documentation of her total disability. However, based on information provided by another of Nelson's treating physicians, Dr. Bhaskar Reddy, the claims department processed her application and determined that Nelson was totally disabled. Dr. Reddy described Nelson's diagnosis as consisting of depression and intermittent

headaches. Nelson received disability benefits for a period of twenty-four months commencing August 29, 1985.¹

On July 29, 1987, WEAIT's claims department wrote to one of Nelson's treating physicians, Dr. Robert Rynearson, for additional medical information. After receiving Dr. Rynearson's response and reviewing additional medical documentation submitted by Nelson, the claims department denied Nelson's application for continued benefits beyond the twenty-four month limitation. The claims department agreed that Nelson suffered from a total disability. However, after reviewing the documents submitted by Nelson and her treating physicians, and obtaining the opinion of an outside consulting physician, the claims department determined that Nelson's disability was due to a mental disorder, not a physical disorder, and terminated her disability benefits.

Nelson appealed the denial of disability benefits to the appeals committee. She argued that her benefits should continue because her total disability was the result of a physical disorder, not a nervous/mental disorder within the meaning of the plan. WEAIT's general counsel reviewed the file, prepared an appeal record, and wrote an appeal summary. The appeals committee reviewed Nelson's file and affirmed the denial, determining that the denial was a reasonable implementation of the relevant provisions of plan.

Nelson then filed suit in Dane County Circuit Court, alleging that WEAIT wrongfully discontinued her disability benefits. The trial court, applying an arbitrary and capricious standard to WEAIT's decision, granted WEAIT's motion for summary judgment and dismissed Nelson's complaint. This appeal followed. Further facts will be stated as necessary.

Summary judgment must be granted to a party if there are no genuine issues as to any material fact and the party is entitled to judgment as a matter of law. Section 802.08(2), STATS. We review a grant of summary judgment *de novo* by applying the same methodology employed by the trial court. *Brownelli v. McCaughtry*, 182 Wis.2d 367, 372, 514 N.W.2d 48, 49 (Ct. App. 1994).

¹ Although WEAIT determined that Nelson became totally disabled on May 31, 1985, it determined that she was eligible for benefits beginning on August 29, 1985.

STANDARD OF REVIEW

In *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101 (1989), the United States Supreme Court held that a denial of benefits under an ERISA plan is to be reviewed under an arbitrary and capricious standard if the benefit plan gives the administrator or fiduciary discretionary authority to determine eligibility for benefits or to construe the terms of the plan. *Id.* at 115. Under the arbitrary and capricious standard, a reviewing court is required to defer to the determination under a plan, so long as that determination was based on a rational interpretation of the plan and was not made in bad faith. *See Miles v. New York State Teamsters Conference Pension Fund*, 698 F.2d 593, 599 (2d Cir.), *cert. denied*, 464 U.S. 829 (1983).

Nelson does not dispute that the long term disability benefit plan issued by WEAIT gives the board of trustees, as the administrator, discretionary authority to determine eligibility for benefits and to construe the terms of the plan.² Rather, she contends that: (1) in applying the arbitrary and capricious standard, the trial court "failed to weigh the fact that the benefit plan gives discretion to a fiduciary operating under a conflict of interest," and (2) the trial court should have applied a *de novo* standard because some of the claims department staff made biased comments in evaluating her claim. We reject both arguments.

It is true that in *Firestone*, the Court stated that "[o]f course, if a benefit plan gives discretion to an administrator or fiduciary who is operating under a conflict of interest, that conflict must be weighed as a 'facto[r]' in determining whether there is an abuse of discretion." *Firestone*, 489 U.S. at 115 (citation omitted). However, Nelson does not identify what conflict the board of trustees had in this case. While Nelson is correct in noting that the court of

² The Agreement and Declaration of Trust provides:

Subject to the stated purposes of the Fund and the provisions of this Agreement, the Trustees shall have full and exclusive authority to determine all questions of coverage and eligibility, methods of providing or arranging for benefits and all other related matters. They shall have full power to construe the provisions of this Agreement and the terms used therein.

appeals in its decision in *Firestone* stated that where the employer is itself the plan administrator, a conflict of interest may arise in some situations, see *Bruch v. Firestone Tire & Rubber Co.*, 828 F.2d 134, 138 (3d Cir. 1987), Nelson's employer, the school district, is not the plan's administrator. The plan's administrator is the board of trustees, which is composed of public school teachers.

According to Nelson, several claims department staff members made biased comments to her in evaluating her claim. According to Nelson, the comments cast doubt on the ability of the administrator to judge the merits of Nelson's claim in a fair and impartial manner. We reject this contention for several reasons.

First, the trial court refused to consider Nelson's contention because this issue was not raised prior to WEAIT's decision on eligibility for continued benefits. Nelson does not explain why the trial court's decision not to consider the comments was improper. Second, assuming that claims department employees did make biased comments, Nelson cites no authority for the proposition that a court should apply a *de novo* standard of review for that reason, rather than the arbitrary and capricious standard of review. Third, Nelson attributes the biased comments to claims department staff members, not members of the appeals committee of the board of trustees. We review the determination of the appeals committee, not the claims department. Nelson does not explain how the comments made by staff members of the claims department affected the decision of the appeals committee.³

³ Nelson's reliance on *State v. Dried Milk Products Co-op.*, 16 Wis.2d 357, 114 N.W.2d 412 (1962) is incorrect. There, the supreme court simply held that the corporate owner of a vehicle could be held vicariously liable for the acts of the vehicle's driver under a statute which provided for penalties for operating a vehicle not in compliance with certain weight restrictions. *Dried Milk Products* cannot be read to stand for the proposition that, in reviewing the decision of an appeals committee under an ERISA benefit plan, comments made by employees not on the appeals committee should nevertheless be attributed to the appeals committee.

WEAIT'S REVIEW OF THE MEDICAL EVIDENCE

Nelson argues that WEAIT conducted a selective review of the evidence in determining that she was not eligible for disability benefits beyond the twenty-four month period. We disagree.

The pertinent facts are not disputed. WEAIT received Nelson's initial long term disability benefits claim application on April 2, 1986. After communicating with several of Nelson's treating physicians, WEAIT determined that Nelson was totally disabled and that her disability was due to a "nervous/mental disorder."

Shortly before the termination of the twenty-four month period, WEAIT wrote to Dr. Ryneerson for information regarding whether Nelson was eligible for benefits beyond the twenty-four month limitation as a result of a total disability due to a physical disorder. In his response, Dr. Ryneerson stated that Nelson's disabling condition is her "severe paranoid personality disorder with intermittent psychotic episodes." Dr. Ryneerson also indicated that Nelson has a seizure disorder. He explained that Nelson was taking medication for the seizure disorder and that the medication was controlling the disorder "so far." He opined that the seizure disorder was a "contributing factor" of her psychological problems, but added that, "I doubt they are causative."

WEAIT's disability claims coordinator, Christine Farrens, wrote to Nelson on October 2, 1987, offering Nelson an opportunity to submit additional medical information in support of her claim of total disability due to a physical disorder. In response, Nelson asked Dr. Ryneerson to again write to WEAIT. In his letter dated October 21, 1987, Dr. Ryneerson states:

I believe that her psychiatric diagnosis of paranoid personality disorder with intermittent psychotic episodes and her diagnosis of complex partial seizure disorder which is imperfectly controlled on anticonvulsant medicines are interrelated. She has, in my opinion, a medical illness which is disabling. I think it might be wise for you to contact Michael W. Morse, M.D., who has been her neurologist here.... He has been treating her for her complex partial seizure disorder.

Farrens then wrote to Nelson requesting that she have Dr. Morse submit information regarding her seizure disorder. By letter dated February 1, 1988, Dr. Morse submitted a letter stating that Nelson's complex partial seizures are not "[i]n and of themselves" disabling.

After several invitations to submit additional material and granting Nelson a time extension, WEAIT received another letter from Dr. Rynearson dated August 25, 1988. In this letter, Dr. Rynearson states:

I do believe that this woman is suffering from a very complicated central nervous system illness. This is a combination of a seizure disorder, of a partial complex variety which is under control with anticonvulsant medication, and evidence ... that there is moderate generalized ventricular enlargement

In addition, the patient, as I have stated earlier, has a serious mental illness and the current belief in Psychiatry at this time is that there is a very strong biological substrate to the kind of mental illness that she has. There may be an interaction between the seizure disorder, the ventricular enlargement, and her mental illness.

Nelson's file was then forwarded by WEAIT's assistant claims manager, Elizabeth Kaestle, to Dr. Richard Armstrong, an outside medical consultant, to independently evaluate Nelson's claim. Dr. Armstrong responded on September 15, 1988, that, based on the past neurologic reports and psychiatric evaluation, and the more recent neurologic opinion by Dr. Morse on February 1, 1988, and another physician on March 15, 1988, "it is my opinion that the patient is disabled on the basis of psychiatric illness and not by a neurological disorder."

After receiving a letter from Nelson indicating that she had nothing further to submit, the claims department staff nonetheless contacted Dr. Morse to determine if he had altered his opinion that Nelson's seizure disorder was not, in itself, disabling. In a telephone conversation on November 16, 1988, Dr. Morse confirmed his earlier position.

On December 9, 1988, WEAIT received a letter from Dr. Morse. In this letter, Dr. Morse stated in part:

I certainly concur with Dr. Rynearson, the patient does have structural brain damage in the form of communicating hydrocephalus. The etiology of it is unclear, but conceivably this could be secondary to a degenerative central nervous system process. I also concur that there is an interaction between the structural disease and the physiologic process which has caused her complex partial seizures. Certainly Norma Nelson does have a mental illness. It is difficult, if not impossible, to tease out how much is mental illness and how much is structural disease, that is hydrocephalus and how much is physiologic disease, that is epilepsy.... I concur with this belief that she has a central nervous system disease which is progressive.

The claims department ultimately concluded that the medical evidence failed to substantiate a total disability due to a physical disease or disorder. Therefore, Nelson was informed that her benefits would not continue beyond the twenty-four month period.

When Nelson appealed the claims department decision to the appeals committee, WEAIT's general counsel reviewed Nelson's file and prepared an appeal summary for the appeals committee. The appeals committee met and reviewed the entire record and determined that the decision to terminate Nelson's long term disability benefits after two years was a reasonable implementation of the plan.

To the extent Nelson argues that Dr. Armstrong engaged in a selective review of the medical evidence, this argument must be rejected. Nelson argues that Dr. Armstrong's conclusion was based only on the February 1, 1988 letter of Dr. Morse and the March 15, 1988 letter of another physician. However, WEAIT sent Nelson's file history to Dr. Armstrong. In his response letter, Dr. Armstrong stated that he based his conclusion on "the more recent neurologic opinion by Dr. Morse on February 1, 1988, and another physician on

March 15, 1988" and "the past neurologic reports and psychiatric evaluation." Nelson offers no support for her contention that Dr. Armstrong did not consider Dr. Rynearson's letter dated October 21, 1987, or that Dr. Armstrong "completely ignore[d]" a portion of Dr. Rynearson's letter dated August 25, 1988. Nelson does not allege that these letters were not in the file. Moreover, although Nelson contends that Dr. Armstrong did not review a letter by Dr. Morse dated December 7, 1988, Nelson concedes that this letter was sent after the date Dr. Armstrong submitted his conclusion to WEAIT.

To the extent Nelson argues that the appeals committee ignored medical evidence, this argument must also be rejected. In its letter to Nelson, WEAIT stated that the appeals committee based its decision upon a review of the record. The record consisted of the appeal file prepared by its general counsel, a copy of which had previously been sent to Nelson. After reviewing this file, Nelson added two documents and corrected another. Nelson offers no evidence that the appeals committee did not consider any item in the file. The record reveals that Nelson's claim was extensively and exhaustively reviewed and re-reviewed by WEAIT. Nelson was given ample opportunity to provide additional medical documentation at several points in the review process. We conclude that WEAIT's decision was based on a rational evaluation of the medical evidence.

Because of our conclusion that WEAIT did not conduct a selective review of the medical evidence, we do not address Nelson's argument that a selective review of the medical evidence would warrant a *de novo* standard of review of WEAIT's decision.

WEAIT'S INTERPRETATION OF PLAN LANGUAGE

Nelson argues that WEAIT's interpretation of plan language was arbitrary and capricious. Because the plan gives the board of trustees discretion to construe the plan's provisions and terms, we will defer to the board of trustees' interpretation if it is reasonable. See *Hammond v. Fidelity & Guaranty Life Ins. Co.*, 965 F.2d 428, 429 (7th Cir. 1992). The relevant portion of the plan language provides:

After an aggregate of two years of monthly disability benefit payments hereunder for total disability due to

neurosis, psychoneurosis, psychopathy, psychosis, or mental or emotional disease or disorder of any kind, the Trust will pay the monthly disability benefit only for the period during which a Covered Employee is confined in a hospital or other institution qualified to provide care and treatment incident to such disability.

In denying Nelson's claim for benefits, WEAIT's general counsel, in his appeal summary addressed to the appeals committee, interpreted the plan language pertaining to the two-year limitation of benefits for total disability based on mental or emotional disease or disorder as follows:

Under the claims administration's interpretation of the policy limitation's key clause -- "for total disability due to ... mental or emotional disease or disorder of any kind" -- if the claimant's inability to work is due to or results from a mental or emotional disease or disorder, the two-year limitation applies and it does not matter whether the mental or emotional disorder is related to a physical disorder. In other words, if a physical disorder is not *in itself* totally disabling, but rather related to or even causative of a mental or emotional disorder which is disabling, then the total disability is "due to ... a mental or emotional disease or disorder." (Emphasis in original.)

We conclude that WEAIT's interpretation of the plan language was reasonable. The plan makes a distinction between mental and physical diseases and disorders and limits disability benefits for the former to twenty-four months. WEAIT's interpretation of the plan language reflects a good faith attempt to maintain this distinction by stating that if a claimant's inability to work involves both a mental and a physical disease or disorder, a claimant will not receive continued benefits unless the physical disease or disorder is in itself totally disabling.

According to Nelson, WEAIT's interpretation would lead to absurd results. As an example, Nelson states that a person with severe head

injuries resulting in a permanent mental disability would be denied coverage after two years. However, under WEAIT's interpretation of the plan language, such a person would appear to be eligible for continued benefits because the person's head injuries in and of themselves caused his or her inability to work. In Nelson's case, Nelson was not able to establish that her complex partial seizures caused her inability to work.

By the Court.--Order affirmed.

Not recommended for publication in the official reports.